THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

The State of New Hampshire

v.

Robert Bruedle

Docket Nos.: 03-S-0025 - 0027-F

The State of New Hampshire

v.

Daniel Henry Kight

Docket Nos.: 03-S-0063 – 0064-F

ORDER ON PENDING MOTIONS

Robert W. Bruedle is charged with two counts of aggravated felonious sexual assault ("AFSA"), one count of kidnapping and one count of conspiracy to commit witness tampering. Bruedle moves this court to compel the testimony of Daniel Henry Kight, a co-defendant on the conspiracy count (following a Richards hearing, if necessary) or, in the alternative, to direct the State to immunize Kight for his trial testimony. The State did not file a written objection to Bruedle's motion, but did file with the court a copy of a handwritten statement from Kight, as well as a copy of the transcript of three one-party intercepts with Kight. Also before the court is the State's motion to consolidate Kight's trial on one count of conspiracy to commit witness tampering and one count of witness tampering with Bruedle's trial on the conspiracy charge.

Prior to addressing the pending motions, the court finds it helpful to briefly discuss the pending charges against Bruedle and Kight. Bruedle is Kight's uncle. Although it is not entirely clear what Bruedle's relationship was with S.E., the victim of the alleged AFSA, it appears that S.E. was a tenant of Bruedle's. The court is not aware whether Kight had any relationship to S.E. prior to the commencement of these cases.

Bruedle is charged with two counts of AFSA against S.E. (See indictmt., docket no. 03-S-025.) The conspiracy charges against the defendants are based on allegations that they agreed to commit the crime of witness tampering and that, in furtherance of the conspiracy, Kight spoke with S.E. and agreed to pay her money in exchange for withholding information from the police relative to the investigation of the alleged AFSA. It is also alleged that Kight later left $1000 at S.E.'s residence in accordance with the agreement. (See Indictmts., docket nos. 03-S-0027-F, 03-S-0063-F.) Kight's charge of witness tampering is based on allegations that while believing an investigation was pending or was about to begin regarding the AFSA, he attempted to induce S.E. to withhold information from the police by telling her to "keep the police out of it and drop it." (Indictmt., docket no. 03-S-0064-F.)

The indictments were handed down on January 16, 2003. Bruedle is alleged to have committed the AFSA on August 14, 2002. The crimes of conspiracy to commit witness tampering and witness tampering are alleged to have occurred on August 28, 2002.

In a written statement dated August 29, 2002, and signed by a witness, Kight stated, in relevant part, as follows:

> My uncle did not at any time tell me to do anything like witness tampering with anybody. I went to meet with [S.E] on my own. She had contacted my uncle's wife to say she wants to talk to him in regards [to] the case[.] [M]y uncle did not want to talk to her so I went to find out what she wanted. She

> and her father wants [sic] money to enable her to leave the State. Her father is the one who suggested that we pay $15,000 to her in a brown paper package and I was to throw this package on his front yard . . . . My uncle had nothing to do with these arrangements. I did not pay the fifteen thousand dollars. I did pay her a thousand dollars on the 23rd of August[.] [S.E.] states that she needed the money to leave. The money was only to help her move. It had nothing to do with my uncle.

In addition to forwarding a copy of the foregoing written statement to the court, the State forwarded a copy of a transcript of three one-way intercept telephone conversations between S.E. and Kight that occurred on August 22, seven days before Kight wrote the above statement. In its cover letter accompanying the transcript, the State characterizes the one-party intercepts as conversations in which "Mr. Kight contacted the victim on behalf of Mr. Bruedle."

The first two conversations between S.E. and Kight were approximately one hour apart, and the second and third conversations were approximately one and one half hours apart. During their first conversation, Kight and S.E. primarily discuss whether S.E. was going to continue to maintain police involvement in the AFSA matter, or contact them and tell them she no longer wished to pursue the matter. They also discussed that S.E. would move back to the residence she was renting from Bruedle.

In the second conversation, S.E. tells Kight that she is having second thoughts about moving back to the residence she was renting from Bruedle, but is concerned that she may not have enough money to move. Kight indicates he will get her whatever money she needs to move, if that is what she decides she wants to do. S.E. suggests $1000 and Kight agrees. The conversation ends with another discussion relative to police involvement in the AFSA investigation, specifically, with Kight suggesting that if the police want to meet with S.E., she could tell them that she did not "want to go through with it" and

that she "want[ed] to end it and that's it." In the third conversation, S.E. and Kight primarily discuss where Kight should leave her the $1000 he agreed he would give her.

Bruedle moves this court to compel Kight to testify at Bruedle's trial, asserting that Kight's written statement indicates first, that Bruedle had no involvement in the alleged conspiracy to commit witness tampering, and second, that Kight can provide "crucial testimony regarding the motives and intentions of the alleged victim and her father in relation to all pending charges." (Docket no. 03-S-0025, doc. no. 21, ¶2.) Bruedle maintains that the court should direct the State to grant Kight immunity to protect Bruedle's right to "exculpatory evidence, all proofs favorable, due process, fair trial, effective assistance of counsel, confrontation and effective cross-examination," because Kight will provide "directly exculpatory evidence at variance with the State's anticipated version of events." (Id. at ¶¶3 & 4.)

"It is well-settled that a defendant has no constitutional right to have immunity conferred upon a defense witness who exercises her privilege against self-incrimination." State v. McManus, 130 N.H. 256, 259 (1987) (citation omitted). It is equally well-settled, however, that "situations could arise in which to deny immunization from prosecution would deprive a defendant of due process on the facts of his case." Id. (citation omitted); see also State v. Roy, 140 N.H. 478, 481 (1995); State v. Monsalve, 133 N.H. 268, 270 (1990). Specifically, due process is implicated upon failure to immunize when a defendant demonstrates that "the testimony sought would be directly exculpatory or would present a highly material variance from the tenor of the State's evidence[.]" Roy, 140 N.H. at 481 (citation omitted). Because federal law affords a defendant no greater protection in this context, id. at 480, the court bases its decision on the New Hampshire Constitution and

refers to federal authority only to assist in the analysis. State v. Ball, 124 N.H. 226, 232 (1983).

In this case, if Kight was to testify consistent with his written statement, the testimony would be "directly exculpatory" in that it indicates Bruedle had nothing to do with Kight's contacts with S.E. relative to both police involvement in the AFSA investigation and to the $1000 payment. Further, Kight's testimony would materially vary from the tenor of the State's evidence. The State has charged Bruedle with involvement in the alleged witness tampering. Additionally, in its cover letter accompanying the copy of Kight's written statement and the one-way intercept transcript, the State alludes to its theory that the transcript relates to telephone calls in which Kight contacted S.E. on behalf of Bruedle. Thus, Kight's proffered testimony that Bruedle had nothing to do with his contacts to S.E. would be materially at odds with the State's theory that Kight and Bruedle agreed Kight would contact S.E. to persuade her to ask police not to pursue AFSA charges against Bruedle.

At the same time that Kight's proffered testimony would be highly exculpatory as to Bruedle, it would be highly inculpatory as to himself. Indeed, it appears that Kight's testimony would be an unequivocal admission of guilt relative to the witness tampering charge. To that end, Kight's attorney indicated at the final pretrial conference that Kight would exercise his right to remain silent and would not testify in keeping with his written statement at trial.

The declarant of an out-of-court statement offered for its truth is "unavailable" for trial when he or she "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statement[.]" N.H. R. Ev. 804(a) (1); see N.H. R. Ev. 801(c) (defining hearsay). Under New Hampshire Rule of Evidence

804(b)(3), a hearsay statement will be admissible at trial when the declarant is unavailable as a witness if the statement, at the time it was made, "so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in this position would *not* have made the statement unless the person believed it to be true." (Emphasis in original.) However, when such a statement "tend[s] to expose the declarant to criminal liability and [is] offered to exculpate the accused[,]" it will not be admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement." Id.

Here, Kight, the declarant of the statements at issue, is unavailable for purposes of rule 804(b)(3) because his attorney has indicated he will exercise his right to remain silent should he be asked to testify consistent with his written statement.[1] See U.S. CONST. amend. V; N.H. CONST. pt. I, art. 15. Moreover, the court finds that Kight's written statement is so highly incriminatory as to himself that "a reasonable person in [Kight's] position would *not* have made the statement unless [he] believed it to be true." N.H. R. Ev. 804(b) (3). Finally, the court finds the transcript of the one-way intercepts between Kight and S.E. would suggest that Kight's written statement is trustworthy. Notably, and contrary to the State's characterization of the one-way intercepts, S.E. contacted Kight to initiate all three conversations. Although there is some indication in Kight's written statement that, at some point, either Bruedle or Bruedle's wife may have encouraged or requested that Kight speak with S.E. in response to S.E.'s attempts to contact Bruedle, there is still nothing in the transcript indicating that Bruedle was involved, in any way, with those particular one-way intercept conversations. Thus, the one-way intercepts are corroborating circumstances that clearly indicate Kight's written statement is trustworthy.

[1] The court finds it need not conduct a Richards hearing in this case because Kight's written statement is unequivocally inculpatory as to the witness tampering charge against him. Cf. State v. Richards, 129 N.H. 669, 673 (1987) (purpose of hearing is to determine whether an individual's "truthful and complete response might be incriminating[.]").

Because the requirements of rule 804(b)(3) are satisfied, Kight's written statement is admissible into evidence at trial if he chooses to exercise his right to remain silent. Therefore, there is no need to immunize Kight to protect the defendant's right of due process, as the testimony the defendant seeks to elicit, namely, that Bruedle had no involvement in the alleged witness tampering activities, will be admissible in the form of Kight's written statement. Cf. McManus, 130 N.H. at 259-60 (no violation of due process where defendant did not demonstrate circumstances justifying immunity and where both trial court and State "took great pains" to insure fair trial and minimize any prejudice due to witness's absence). Accordingly, Bruedle's Motion for Richards Hearing and Immunized Testimony is **DENIED**.

As to the issue of consolidation, the court first notes that defense counsel have not yet filed objections to the State's Motion to Consolidate, and further observes that the time for doing so has not yet expired. However, in the interest of streamlining the issue for the parties, the court discusses the propriety of consolidating Bruedle and Kight's cases for trial on the charges relating to witness tampering.

At the final pretrial conference on January 29th, there was some discussion indicating that although Kight had made exculpatory statements relative to Bruedle, he has also made some inculpatory statements relative to Bruedle. To the extent the State seeks to introduce at trial any statements by Kight tending to inculpate Bruedle (or, for that matter, any statements Bruedle may have made tending to inculpate Kight), except insofar as the statements are in furtherance of the alleged conspiracy, see N.H. R. Ev. 801(d)(2)(E), the cases cannot be consolidated for trial. See Bruton v. United States, 391 U.S. 123, 126 (1968) (admission at joint trial of extrajudicial statements of one of accused that incriminated other accused, when declarant declined to testify and therefore could not

be cross-examined, violated right of cross-examination secured by confrontation clause of Sixth Amendment); see also Roberts v. Russell, 392 U.S. 293, 294 (1968) (Sixth Amendment right of cross-examination applicable to states under Fourteenth Amendment). However, if the State does not seek to introduce into evidence any statements of Kight or Bruedle tending to inculpate the other, there is no Bruton problem and the cases can be tried together.

Accordingly, the court defers issuing a final ruling on the State's Motion to Consolidate, pending both a response from the defendants and an indication from the State as to whether it intends to offer as evidence at trial any statements of Kight tending to inculpate Bruedle.

So **Ordered**.

Date: February 2, 2004

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Bruce E. Mohl
Presiding Justice